60/27

Office - Supreme Court
FILED
JAN 27 1956
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

October Term, 1955

No. 648

CHARLES W. LEEPER, I. P. FARFAR, SADLER S. GLADDEN, ROBERT H. GREENE, JAMES HEATH, HENRY M. ISLEY, RUSSELL McLAUGHLIN, ANTHONY M. WALKER, HAROLD WALKER, EDWARD J. WEDDINGTON, JAMES J. WEDDINGTON, WILLIE LEE WEDDINGTON, L. A. WARNER, G. M. WILKINS, ROY S. WYNN and RUDOLPH M. WYCHE,

Petitioners,

vs.

CHARLOTTE PARK AND RECREATION COMMISSION, a Municipal Corporation, OSMOND L. BARRINGER, ABBOTT REALTY COMPANY, a Corporation, and CITY OF CHARLOTTE, a Municipal Corporation.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

ROBERT L. CARTER,
THURGOOD MARSHALL,
SPOTTSWOOD W. ROBINSON, III,
T. H. WYCHE,
Counsel for Petitioner.

ELWOOD H. CHISOLM,
WILLIAM L. TAYLOR,
Of counsel.

SUPREME PRINTING CO., INC., 114 WORTH STREET, N. Y. 13, BEEKMAN 3-2320
49

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Question Presented	2
Constitutional Provisions and Statutes Involved	3
Statement of the Case	3
Reasons for Allowance of the Writ	7
Conclusion	18
Appendix A:	
Opinion of the Supreme Court of North Carolina entered June 30, 1955	19
Judgment of the Supreme Court of North Carolina entered June 30, 1955	37
Appendix B:	
Petition for Rehearing Denied	38
Appendix C	
An Ordinance to Set Aside and Dedicate Certain Lands of the City of Charlotte for Park and Recreation Purposes	39
Exhibit "A"	42
Appendix D:	
An Ordinance Amending the Ordinance Entitled "An Ordinance to Set Aside and Dedicate Certain Lands of the City of Charlotte for Park and Recreation Purposes"	47

Table of Cases

PAGE

Allison v. Sharpe, 209 N. C. 477, 184 S. E. 27 (1936) 11n
American Federation of Labor v. Swing, 312 U. S. 321 13

Barrows v. Jackson, 346 U. S. 249 .....8, 9, 10, 13, 15, 17
Bolling v. Sharpe, 347 U. S. 497 ..... 7, 17
Bridges v. California, 314 U. S. 252.....
Brown v. Board of Education, 347 U. S. 483 7
Brown v. Independent Baptist Church of Woburn, 325 Mass. 645, 91 N. E. ed. 922 (1950) 12n, 17
Buchanan v. Warley, 245 U. S. 60 8

Cantwell v. Connecticut, 310 U. S. 296 13
Civil Rights Cases, 109 U. S. 3 12
Claremont Improvement Club v. Buckingham, 89 Cal. App. 2d 32, 200 P. 2d 47 (1948) 16
Clifton v. Puente, 218 S. W. 272 (Tex. Civ. App. 1949) 16
Collette v. Town of Charlotte, 114 Vt. 357, 45 A. 2d 203 (1946) 12n
Copenhaver v. Pendleton, 155 Va. 463, 155 S. E. 802 (1930) 12n

Ex Parte Laws, 31 Cal. App. 846, 193 P. 2d 744 (1948) 15
First Universalist Society v. Boland, 155 Mass. 171, 29 N. E. 524 (1892) 12n

Guinn v. United States, 238 U. S. 347 ..... 9n

Hall v. Turner, 110 N. C. 292, 14 S. E. 791 (1892) ... 21n
Harmon v. Tyler, 273 U. S. 668, rev'g, 160 La. 943, 107 So. 704 (1926) 8, 10
Holmes v. Atlanta, — U. S. — 100 L. ed. (Advance p. 76) 7, 8, 9, 17
Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398 14
Hurd v. Hodge, 334 U. S. 24 ..... 15, 17

PAGE

Kern v. Newton, 151 Kan. 565, 100 P. 2d 709 (1940) 9n

Land Development Co. v. New Orleans, 17 F. 2d 1016 (CA 5th 1927), rev'g, 13 F. 2d 898 (E. D. La. 1926) 10
Lane v. Wilson, 307 U. S. 268 ..... 8, 9n
Lawrence v. Hancock, 76 F. Supp. 1004 (S. D. W. Va. 1948) 9n
Liberty Annex Corp. v. Dallas, 289 S. W. 1067 (Tex. Civ. App. 1927), 19 S. W. 2d 845 (Tex. Civ. App. 1929) 15
Lide v. Mears, 231 N. C. 111, 56 S. E. 2d 404 (1949) 11n

McLaurin v. Oklahoma State Regents, 339 U. S. 637 8
Marsh v. Alabama, 326 U. S. 501 14
Mayor & City Council of Baltimore City v. Dawson, — U. S. —, 100 L. ed. (Advance p. 75) 7, 8, 9, 17

Nixon v. Condon, 286 U. S. 73 .....
Nixon v. Herndon, 273 U. S. 536 ..... 9n
Norman v. Baltimore & O. R. Co., 294 U. S. 240 14

Republic Aviation Corp. v. National Labor Relations Board, 324 U. S. 793 14
Rice v. Elmore, 165 F. 2d 387 (CA 4th 1947), cert. denied, 333 U. S. 875 ..... 9n
Richmond v. Deans, 281 U. S. 704, aff'g 37 F. 2d 712 (CA 4th 1930) 8, 9n

Shelley v. Kraemer, 334 U. S. 1 .....8, 9, 10, 13, 14, 16, 17
Smith v. Allwright, 321 U. S. 649, ... 9n

Turpin v. Jarrett, 226 N. C. 135, 37 S. E. 2d 124 (1946) 12n
Twining v. New Jersey, 211 U. S. 78 .....
Tryon v. Duke Power Co., 222 N. C. 200, 22 S. E. 2d 450 (1942) 11n

Woytus v. Winkler, 357 Mo. 1082, 212 S. W. 2d 411 (1948) 16

PAGE

Williams v. Blizzard, 176 N. C. 146, 96 S. E. 957 (1918) 12n

Other Authorities

American Jurisprudence, "Estates," Sec. 29 ..... 12n

Borchard, Declaratory Judgments 22 et seq. (2 Ed. 1941) 11n

Tiffany, Law of Real Property (3rd Ed.), Sec. 217 12n

IN THE

Supreme Court of the United States

October Term, 1955

No.

CHARLES W. LEEPER, I. P. FARRAR, SADLER S. GLADDEN, ROBERT H. GREENE, JAMES HEATH, HENRY M. ISLEY, RUSSELL MCLAUGHLIN, ANTHONY M. WALKER, HAROLD WALKER, EDWARD J. WEDDINGTON, JAMES J. WEDDINGTON, WILLIE LEE WEDDINGTON, L. A. WARNER, G. M. WILKINS, ROY S. WYNN and RUDOLPH M. WYCHE,

Petitioners,

vs.

CHARLOTTE PARK AND RECREATION COMMISSION, a Municipal Corporation, OSMOND L. BARRINGER, ABBOTT REALTY COMPANY, a Corporation, and CITY OF CHARLOTTE, a Municipal Corporation.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina modifying, and affirming as modified, a final judgment of the Superior Court of Mecklenburg County, North Carolina, wherein originally the Charlotte Park and Recreation Commission was plaintiff and the remaining parties were defendants.

Opinions Below

The opinion of the Supreme Court of North Carolina is reported at 242 N. C. 311 and at 88 S. E. 2d 114 and appears as Appendix A to this petition. The opinion of the Superior Court of Mecklenburg County is unreported and appears at pages 86-94 of the record as printed for use of the Supreme Court of North Carolina.[1]

Jurisdiction

The judgment sought to be reviewed was entered by the Supreme Court of North Carolina on June 30, 1955 and appears at page 37, Appendix A to this petition. Petitioners' timely petition for rehearing was denied November 1, 1955. This order appears at Appendix B to this petition. The jurisdiction of this Court to review by writ of certiorari the judgment in question is conferred by Title 28, United States Code, Section 1257(3).

Question Presented

Can a state effectuate provisions contained in a deed conveying real property for a public park to a municipal recreation commission, purporting to cause a reverter of part of the park property upon use by Negroes of a public golf course therein, without denying to petitioners rights secured by the due process and equal protection clauses of the Fourteenth Amendment and by Title 42, United States Code, Section 1981?

---

[1] Copies of the record as printed for use of the Supreme Court of North Carolina, including the accompanying "Pertinent Provisions of the Charter of the City of Charlotte As Taken from Exhibit XIII," are filed herein pursuant to Rule 21(4). References are to the pages of this record.

Constitutional Provisions and Statutes Involved

This case involves constitutional provisions, statutes and ordinances as follows:

1. United States Constitution, Amendment 14, Section 1.
2. Title 42, United States Code, Section 1981.
3. Ordinance entitled "An Ordinance to Set Aside And Dedicate Certain Lands of the City of Charlotte for Park and Recreation Purposes" adopted by the City Council of the City of Charlotte, North Carolina, on February 21, 1929 (Appendix C).
4. Ordinance entitled "An Ordinance Amending the Ordinance Entitled 'An Ordinance to Set Aside and Dedicate Certain Lands of the City of Charlotte for Park and Recreation Purposes'" adopted by the City Council of the City of Charlotte, North Carolina, on May 7, 1929 (Appendix D).

Statement of the Case

The facts are undisputed. They are established by the findings of the Superior Court (R. 86-92), based upon an agreed statement of facts (R. 60-86), and were relied upon by the Supreme Court of North Carolina (242 N. C. at 312-315, 88 S. E. 2d at 116-118) as the basis for its conclusions.

The City of Charlotte is a municipal corporation of the State of North Carolina discharging governmental functions (R. 61, 87, 104). The Charlotte Park and Recreation Commission is a public body corporate having ownership of, general jurisdiction and control over all recreational facilities in Charlotte, North Carolina (R. 60, 86-87, 103-104).

The Commission brought this action for a judgment declaratory of the effect and validity of provisions in deeds

conveying to the Commission the real estate upon which is presently located Revolution Park, a municipally owned and operated park, in a portion of which the Commission operates the Bonnie Brae Golf Course. The provisions in question purport to restrict the use of these public facilities to white persons only; and, in the event such restriction is violated, the land is to revert.

On or about August 31, 1927, several landowners offered real estate to the City "to be used by the City of Charlotte through its Park and Recreation Commission for white people's parks and playgrounds, parkways and municipal golf courses only" (R. 2-3, 7-8, 10-12, 61, 87, 104-105). The offer further specified that in the event that the lands should not be so used, the properties would revert to each donor (R. 12, 61, 87, 105). On February 21, 1927, the City enacted an ordinance accepting the offer and designating the property "as a park and recreation area for use by people of the white race only" (Appendix C; R. 3, 7-12, 62, 88, 105). On May 7, 1929, it adopted another ordinance eliminating certain land from the park area and confirming the original ordinance as so amended (Appendix D; R. 3, 13-14, 62, 88, 105).

The park properties were conveyed to the Commission by four separate deeds: Osmond L. Barringer, Abbott Realty Company and City of Charlotte are three of the grantors. Each provided that the properties should be maintained as an integral part of a park and recreation area (R. 3-4, 17-18, 25, 33, 38, 62-63, 88-89, 105-106). Each deed, except that from the City, provided that the properties were "to be kept and maintained for the use of, and to be used and enjoyed by, persons of the white race only" (R. 3-4, 17-18, 25, 33, 62-63, 88-89, 105-106); and all, except the deed from Abbott Realty Company, contained provisions purporting to cause a termination of the Commission's estate

in and a reverter of the property to the grantor thereof upon use by Negroes of any portion of the park properties (R. 3-4, 19, 27, 34, 38, 62-63, 88-89, 105-106).

The Bonnie Brae Golf Course is maintained and operated by the Commission as a part of a system of supervised recreation of the City (R. 64, 90, 107). It is the only course provided or operated by the Commission or the City that affords opportunities or facilities for playing the game of golf (R. 64, 90, 107). The Commission maintains and operates this course, the remainder of Revolution Park, and all facilities therein exclusively for the use and enjoyment of white persons (R. 5, 64, 90, 107). All white persons who pay the fees and charges and comply with the rules and regulations relating to use of the course have been and are afforded the right and privilege of admission thereto and use thereof (R. 64, 90, 107). On the other hand, petitioners and all other Negroes, because of race or color, are denied admission to and the use of the course (R. 64, 90, 107).

On or about December 20, 1951, petitioners presented to the Commission a petition alleging that they had been denied the right and privilege of admission to and the use of the Bonnie Brae Golf Course in violation of rights secured to them by the Constitution and law of the United States, and requesting that such discrimination cease (R. 5-6, 64-65, 74-86, 90-91, 107-108). Shortly thereafter, the Commission instituted this suit. The Commission did not change its policy, and a suit was filed in the Superior Court by petitioners seeking to enjoin the Commission from refusing to bar them from the golf course.

From the outset and throughout these proceedings, petitioners have claimed that the operation of the reverter provisions upon use by Negroes of the Bonnie Brae Golf

Course, in consequence of the action, authority or sanction of the State of North Carolina, would deny petitioners due process of law and the equal protection of the laws and would violate Title 42, United States Code, Section 1981 (R. 44-46). They specifically requested declarations to that effect (R. 52-53). On the other hand, throughout this litigation the Commission, along with Barringer and Abbott, Realty Co. have asserted that the reverter provisions are constitutionally valid and automatically operative.

The Superior Court concluded: (a) that the deeds in question created valid determinable fees in the Commission with possibilities of reverter to the grantors (R. 92-93, 109-110); (b) that in the event of the admission of Negroes to any part of Revolution Park, the properties conveyed by Barringer and Abbott Realty Company would immediately re-vest in them by operation of law (R. 93, 94, 110, 111); and (c) that, because the City had only one golf course, the use of that course by Negroes would not cause a reversion to the City of that parcel conveyed to the Commission by the City since this would violate the Fourteenth Amendment (R. 93-94, 110).

Petitioners excepted to the Superior Court's conclusions insofar as they would sustain the operation of the reverter provisions upon non-white use of the park properties (R. 92-95). They perfected an appeal to the Supreme Court of North Carolina on assignments of error (R. 95-102), appropriately raising the federal questions presented by this petition. That court modified the judgment of the Superior Court, holding upon a construction of the deed from the Abbott Realty Company that no reverter would result, and, as modified, affirmed the judgment of the court below on the ground that no state action would be involved in the operation of the reverter provisions. 242 N. C. at

322, 88 S. E. 2d at 123 (see Appendix A). The federal questions were preserved by petitioners in their application for rehearing,[2] which was denied.[3]

Reasons for Allowance of the Writ

1. It is clear that the state cannot directly or indirectly burden the use and enjoyment of public parks and recreational facilities with restrictions based upon race or color. *Mayor* v. *Dawson*, —— U. S. ——, 100 L. ed. (Advance p. 75); *Holmes* v. *City of Atlanta*, —— U. S. ——, 100 L. ed. (Advance p. 76). This is exactly what the Commission has done. Moreover, it sought to shield its illegal conduct against the reach of the Fourteenth Amendment on the ground that the terms of the grants required imposition of the assailed restrictions and that the property must revert to the grantors if Negroes used the golf course. The opinion below sanctions and sustains this position with respect to the Barringer parcel and vindicates the Commission's discriminatory policy. We submit that the Commission's action and the decision below are in direct conflict with the decisions of this Court condemning state enforced racial distinctions in the use and enjoyment of public facilities. *Mayor* v. *Dawson, supra,* and *Holmes* v. *City of Atlanta, supra.* See also the *School Segregation Cases* (*Brown* v. *Board of Education,* 347 U. S. 483, *Bolling* v. *Sharpe,* 347 U. S. 497).

The City sought to implement the deed restrictions by ordinances barring Negroes, solely as Negroes, from use of Revolution Park (see Appendices C and D), and by restrictions in its own deed to the Commission. This whole course of conduct is illegal, and it is clear that these restrictions,

---

[2] See pages 1-3 of the petition for rehearing in the record.

[3] See Appendix B.

standing alone, could not be enforced or given court sanction.

The ordinances are obviously unconstitutional. See *Buchanan* v. *Warley,* 245 U. S. 60; *Harmon* v. *Tyler,* 273 U. S. 558, rev'g, 160 La. 943, 107 So. 704 (1926); *Richmond* v. *Deans,* 281 U. S. 704, aff'g, 37 F. 2d 712 (CA 4th 1930). Equally obvious, we submit, is the unconstitutional character of the racial restrictions set out in the City's conveyance. Compare *Shelley* v. *Kraemer,* 334 U. S. 1 and *Barrows* v. *Jackson,* 346 U. S. 249, with *Buchanan* v. *Warley, supra*; *Harmon* v. *Tyler, supra*; and *Richmond* v. *Deans, supra.*

The public parks belong to the citizens of Charlotte and neither the City nor the Commission can impose racial conditions with regard to their use. Both seek to defeat this constitutional proscription by imposing consequences on the use of the park by Negroes totally different from those involving use by white persons. It is clear, we submit, that no governmental agency can operate a public facility for the exclusive use of white persons, nor enforce, as to the park, a condition that if Negroes use it, the park can no longer remain in the public domain.

A state cannot impose unconstitutional conditions upon the exercise by a Negro of his constitutional rights. *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637. But here Negroes are told that a consequence of exercising their constitutional right to play golf on the Bonnie Brae Golf Course will be that another part of Revolution Park will revert to its grantor. This is as effective an enforcement of racial distinctions in the use and enjoyment of public park facilities as those condemned by this Court in the *Dawson* and *Holmes* cases. The protection of the Constitution extends to "sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson,* 307 U. S. 268,

275. The state here cannot be permitted by this device to deny these petitioners their right to equal protection of the laws where it is clear that restrictions of this character directly imposed by the state could not be sustained.[4] It is respectfully submitted that this petition should be granted to determine whether the state action here involved and the decision below are violative of principles announced by this Court in *Mayor* v. *Dawson, supra,* and *Holmes* v. *City of Atlanta, supra.*

2. The decision of the court below in sanctioning and validating the reverter provision in the Barringer deed is in apparent conflict with the decisions of this Court in *Shelley* v. *Kraemer, supra,* and *Barrows* v. *Jackson, supra.*

In *Shelley* v. *Kraemer* this Court held that enforcement by injunction of a racially restrictive covenant, directed pursuant to the state's common law policy as formulated in earlier decisions, denies the equal protection of the laws secured by the Fourteenth Amendment. In that case, this Court recognized that the Amendment is not rendered ineffective "simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement," 334 U. S. at page 20, and "that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment . . ." *Id.* at 17. It concluded "that judicial action is not immunized from the operation of the

---

[4] *Compare* Shelley v. Kraemer, *supra,* with Buchanan v. Warley, *supra*; Smith v. Allwright, 321 U. S. 649 and Nixon v. Condon, 286 U. S. 73 *with* Nixon v. Herndon, 273 U. S. 536; Lane v. Wilson, 307 U. S. 268 *with* Guinn v. United States, 238 U. S. 347. *See* Richmond v. Deans, *supra*; Rice v. Elmore, 165 F. 2d 387 (CA 4th 1947), *cert. denied,* 333 U. S. 875; Lawrence v. Hancock, 76 F. Supp. 1004 (S. D. W. Va. 1948); Kern v. Newton, 151 Kan. 565, 100 F. 2d 709 (1940).

Fourteenth Amendment simply because it is taken pursuant to the state's common law policy." *Id.* at 20.

Similarly, in *Barrows* v. *Jackson,* this Court held that a state court's award of damages for a party's nonobservance of such a covenant would likewise infringe the Fourteenth Amendment. There the court concluded, "The action of a state court at law to sanction the validity of the restrictive covenant here involved would constitute state action as surely as it was state action to enforce such covenants in equity, as in *Shelley, supra.*" [5] 346 U. S. at 254.

Petitioners submit that the Supreme Court of North Carolina has misconstrued the rationale of the *Shelley* and *Barrows* cases. In those cases the Court held that the Fourteenth Amendment precludes a court from sanctioning a discriminatory agreement either by the enforcement of the agreement or by the imposition of penalties for breach thereof. It is precisely this kind of sanction that the North Carolina courts have given to the reverter provision in the Barringer deed. Already they have adjudged that it will cause a reverter of the Barringer tract upon use of the golf course by Negroes. If the Commission should fail to

---

[5] *And see* Harmon v. Tyler, *supra,* where a Louisiana statute, and a New Orleans ordinance as well, made it unlawful for any white person to establish his residence on any property located in a Negro community without the written consent of a majority of the Negroes inhabiting the same, or for any Negro to establish his residence on any property located in a white community without the written consent of a majority of the white persons inhabiting the community. These were held unconstitutional on authority of Buchanan v. Warley, *supra.* The refusal of a landowner, unassisted by governmental authority, to sell or lease to another citizen would not of itself involve any Fourteenth Amendment implications. The vice lay in the sanctions—here criminal penalties—supplied by the State and the city. *Cf.* Land Development Co. v. New Orleans, 17 F. 2d 1016 (CA 5th 1927), *rev'g,* 13 F. 2d 898 (E. D. La. 1926).

obey the state court judgment by refusing to yield possession to Barringer on the occurrence of this event, ample judicial sanctions will be available to compel obedience, just as sanctions would have been available to the plaintiff in *Shelley* had the defendant refused to move, and to the plaintiff in *Barrows,* if defendant had refused to pay damages awarded by the state court.[6]

Moreover, when the basis for the holding of the Supreme Court of North Carolina is examined, the presence of state action becomes even more apparent. The State of North Carolina, as a part of its common law, recognizes the determinable fee simple estate and the concomitant possibility of reverter. Its common law rules also cause an automatic termination of the grantee's estate and conversion of the grantor's nonpossessory possibility into a possessory estate, upon the happening of the stated event. These propositions the Supreme Court of North Carolina stated in its opinion

---

[6] See 1A, Gen. Stats. of North Carolina, No. 1-253,259. The fact that declaratory judgments are not self-executing does not make them unique. In almost all actions, whether at equity or at law, a recalcitrant party can be made to comply with a judgment only by a new invocation of the judicial process. Borchard, Declaratory Judgments 22 *et seq.* (2 ed. 1941). Thus, this case cannot be distinguished from the *Shelley* and *Barrows* decisions on the ground that here a declaratory judgment was sought rather than equitable relief or legal damages. If the judgment here complained of was merely an advisory opinion, there might be some basis for a distinction, but the Supreme Court of North Carolina has expressly negated its power to render advisory opinions under its Declaratory Judgments Act. *See* Lide v. Mears, 231 N. C. 111, 56 S. E. 2d 404 (1949); Tryon v. Duke Power Co., 222 N. C. 200, 22 S. E. 450 (1942); Allison v. Sharpe, 209 N. C. 477, 184 S. E. 27 (1936).

and applied in the instant case.[7] Conformably thereto, it held that ownership of the disputed property would "automatically" revest in Barringer upon the happening of a stated event, *i. e.*, the admission of the petitioners to the golf course. Thus, under the Court's judgment, Barringer will be able to exercise the incidents and benefits of ownership (although not necessarily of possession) as soon as petitioners are admitted to the golf course, without the necessity of invoking further judicial sanctions to execute the judgment.

As was pointed out in the *Civil Rights Cases,* 109 U. S. 3, 17, racial discrimination by individuals escapes the ban of the Fourteenth Amendment only so long as such discrimination is "unsupported by state authority in the shape of laws, customs or judicial or executive proceedings" and that immunity is lost the moment such discrimination is "sanctioned in some way by the state. . . ." The reverter provision obtains its automatic operation and title-trans-

---

[7] In addition to reference to many decisions, the Court specifically stated at 242 N. C. at 320, 321, 88 S. E. 2d at 122, 123: "In North Carolina we recognize the validity of a base, qualified or determinable fee. Hall v. Turner, *supra* [110 N. C. 292, 14 S. E. 791 (1892)]; Williams v. Blizzard, 176 N. C. 146, 96 S. E. 957 (1918); Turpin v. Jarrett, 226 N. C. 135, 37 S. E. 2d 124 (1946).

* * *

"It is a distinct characteristic of a fee determinable upon limitation that the estate automatically reverts at once on the occurrence of the event by which it is limited, by virtue of the limitation in the written instrument creating such fee, and the entire fee automatically ceases and determines by its own limitations. Collette v. Town of Charlotte, *supra* [114 Vt. 357, 45 A. 2d 203 (1946)]; First Universalist Society v. Boland, *supra* [155 Mass. 171, 29 N. E. 524 (1892)]; Brown v. Independent Baptist Church of Woburn, *supra* [325 Mass. 645, 91 N. E. 2d 922 (1950)]; Copenhaver v. Pendleton, 155 Va. 463, 155 S. E. 802 [1930]; Tiffany: Law of Real Property, 3rd Ed., Section 217. No action on the part of the creator of the estate is required, in such event, to terminate the estate. 19 Am. Jur., Estates, Section 29."

ferring characteristics from the significance that North Carolina attaches to the deed limitations. The highest court in that State has adjudged that, by operation of its common law rules, there will occur a reverter to Barringer if Negroes are admitted to the golf course. That such a judicial declaration of rights and liabilities accorded by common law rules is state action within the meaning of the Fourteenth Amendment is abundantly established by the decisions of this Court. See *Shelley* v. *Kraemer, supra*; *Barrows* v. *Jackson, supra*; *American Federation of Labor* v. *Swing,* 312 U. S. 321; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Bridges* v. *California,* 314 U. S. 252.

The state action here is indistinguishable from that condemned by this Court in *Barrows* v. *Jackson* as violative of the Fourteenth Amendment. In the *Barrows* case, this Court held that a state court could not award damages for breach of a restrictive covenant without invading the constitutionally protected rights of Negro citizens to acquire land, even though the granting of damages would have left the Negro purchaser totally undisturbed in the enjoyment of his land. The Court stated at page 254:

> To compel respondent to respond in damages would be for the State to punish her for her failure to perform her covenant to continue to discriminate against non-Caucasians in the use of her property. The result of that sanction would be to encourage the use of restrictive covenants. To that extent, the State would act to put its sanction behind the covenants.

This rationale is precisely applicable to the instant case, for the giving of judicial sanction to the reverter provisions operates to penalize the City and Commission for failure to obey discriminatory provisions in the deed. Moreover, the effect of the court sanction is more direct here for

it operates to deprive the petitioners of the right to use public facilities, while in the *Barrows* case, a damage judgment would not have affected the Negro purchaser's enjoyment of his land.

Further, the Court held that failure to give force and effect to the reverter would violate due process. But an individual's right to contract and a property owner's right to exercise the incidents of his ownership are each subordinate to paramount constitutional considerations. *Norman* v. *Baltimore & O. R. Co.*, 294 U. S. 240; *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398. From its inception every individually created property interest is subject to the infirmity that the state cannot sanction its operation if a violation of constitutionally-protected rights will follow. *Marsh* v. *Alabama*, 326 U. S. 501; *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U. S. 793. The state may effectuate property interests and give operation to contracts so long as those things may be done consistently with the Constitution. But the state cannot avoid the prohibitions of the Fourteenth Amendment by seeking to protect a right that cannot constitutionally obtain. The desire of the state to promote private or public interests must be subordinated to its obligation to respect fundamental constitutionally-protected civil rights. In all cases, the state must square its action with the overriding mandate of the Fourteenth Amendment, regardless of how it squares with other interests.

The right of an individual to make a contract or to own and dispose of his property does not vest in him the privilege of directly or indirectly requiring a governmental agency to discriminate against its citizens on racial grounds. Nor does it invest him with power to create a device the legal operation of which offends the Constitution. As in *Shelley* v. *Kraemer*, *supra*, the Court said at page 22:

> The Constitution confers upon no individual the right to demand action by the State which results in

> the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment.

See also *Barrows* v. *Jackson, supra*; *Hurd* v. *Hodge,* 334 U. S. at 24, 34-35. Indeed this is the *ratio decedendi* of the *Shelley* and *Barrows* cases. Petitioners submit that review of this case is necessary if this Court's decisions in *Shelley* and *Barrows* barring judicial sanction and enforcement of racially restrictive covenants are not to be sapped of their vitality.

3. The decision of the Supreme Court of North Carolina in this case conflicts with decisions of other state courts holding that a state may not indirectly accomplish a denial of civil rights by sanctioning privately-initiated property restrictions.

In *Liberty Annex Corp.* v. *Dallas,* 289 S. W. 1067 (Tex. Civ. App. 1927), 19 S. W. 2d 845 (Tex. Civ. App. 1929), it was held that a municipal ordinance making it a criminal offense to violate a pre-existing segregation agreement privately-made between certain whites and Negroes relative to certain property is violative of the Fourteenth Amendment. Voluntary adherence to the terms of the agreement would have occasioned no constitutional difficulties, but the criminal sanctions supplied by the city made the difference.

Similarly, in *Ex parte Laws,* 31 Cal. App. 846, 193 P. 2d 744 (1948), petitioners sought discharge by habeas corpus from imprisonment for contempt for refusing to obey a court order to vacate restricted property entered pursuant to a final judgment enjoining the petitioners from using or occupying the land in violation of privately-imposed racial restrictions. The court held that petitioners must be

discharged, since the commitments amounted to state action in indirect enforcement of the restrictions within the purview of the decision in *Shelley* v. *Kraemer, supra.*

In *Claremont Improvement Club* v. *Buckingham,* 89 Cal. App. 2d 32, 200 P. 2d 47 (1948), a California court of appeals reversed the judgment of a lower court which had granted an injunction against the breach of a private racially restrictive covenant. The appellee contended that even if *Shelley* v. *Kraemer, supra,* prohibited the issuance of an injunction, its prayer for a declaratory judgment that the covenant was valid should be sustained. The appellate court denied this relief also, holding that if the covenant was unenforceable, the whole purpose of the litigation failed.

Similarly, in *Woytus* v. *Winkler,* 357 Mo. 1082, 212 S. W. 2d 411 (1948), the court affirmed the dismissal of an action brought to divest title to real estate and enjoin breach of a racial restrictive covenant between property owners which provided against sale of the land to or occupancy thereof by any Negro. In this case the Negro defendants had been vested with title and were in possession. The affirmance was on authority of *Shelley* v. *Kraemer, supra.*

And, in *Clifton* v. *Puente,* 218 S. W. 272 (Tex. Civ. App. 1949), a deed contained a restriction against sale to persons of Mexican descent and a provision for reverter in that event. The property was sold to Puente, a naturalized American of Mexican descent. In a suit for cancellation of Puente's deed, the court sustained his demand for title and possession against the claim that the restrictive and reverter provisions constituted a defense thereto. It said: "It is as much an enforcement of the covenant to deny to a person a legal right to which he would be entitled except for the covenant as it would be to expressly command by judicial order that the terms of the covenant be recognized and carried out . . . judicial recognition or enforcement

of the racial covenant involved here by a state court is precluded by the 'equal protection of the laws' clause of the Fourteenth Amendment.''

It is respectfully submitted that this petition should be granted to resolve this conflict in decisions of state courts.

4. The instant case raises questions of great public importance which should be determined by this Court. Petitioners do not know how many conveyances for public use with reverter provisions of this character have been made. One need not be a student of American race relations, however, to realize that the arrangement here involved, reflecting as it does local custom, usage and attitudes, cannot be regarded as an isolated phenomenon. Indeed, such provisions are probably attached to many public facilities in use throughout the United States. This decision places a cloud upon any public property where the grantor made enforcement of racial discrimination a condition of his grant.

The immediate effect of the decision of the North Carolina Supreme Court, therefore, goes beyond the narrow facts of the instant case. Its ramifications promise to be widespread indeed. For, in the light of this case, the right of Negroes and other minority groups to use public recreational facilities without discrimination, see *Dawson* and *Holmes* cases, *supra,* to enjoy nonsegregated public educational facilities, see *Brown* v. *Board of Education, supra*; *Bolling* v. *Sharpe, supra,* and to acquire housing though encumbered by racial covenants, see *Shelley* v. *Kraemer, supra; Barrows* v. *Jackson, supra; Hurd* v. *Hodge, supra,* all become questionable.

This device provides a method for full frustration of constitutional doctrines evolved in those cases. Racial restrictive covenants, declared unenforceable by injunction in *Shelley* and by an award of damages in *Barrows,* may now be enforced by judicial sanction of reverter provisions

sustained in this case. Property owners need only provide that in event the contract is violated, the property shall revert to render *Shelley* and *Barrows* completely meaningless.

The decision below poses a gross danger to the strength and vitality of the Constitution's proscription against governmental enforcement of racial distinctions and differentiations, and this petition should be granted to resolve this important public question.

CONCLUSION

Wherefore, for the reasons hereinabove stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

Robert L. Carter,
Thurgood Marshall,
Spottswood W. Robinson, III,
T. H. Wyche,
Counsel for Petitioner.

Elwood H. Chisolm,
William L. Taylor,
Of counsel.

APPENDIX A

Opinion of the Supreme Court of North Carolina entered June 30, 1955

Appeal by all the defendants, except Osmond L. Barringer, Abbott Realty Company and the city of Charlotte, from Patton, Special Judge, Extra February Civil Term 1955 of Mecklenburg.

Civil action to have determined questions of the construction or validity of provisions in certain deeds restraining the use of the lands conveyed, and requiring that the lands revert to the grantors if such restrictions are not carried out.

All parties to the action, by written stipulation filed with the court, waived a jury trial, and consented that the court find the facts. The facts found by the Judge necessary for a decision of the questions presented are summarized as follows:

One. Charlotte is a municipal corporation of the State of North Carolina. General control, management and authority over the parks and playgrounds of Charlotte are vested by law in the plaintiff, a public body corporate known as Charlotte Park and Recreation Commission.

Two. On 31 August 1927 W. T. Shore and T. C. Wilson, and the defendants Barringer and Abbott Realty Company, offered to give to the city of Charlotte through plaintiff for park and playground purposes certain lands free from encumbrance upon the following conditions:

1. "Said lands are to be used by the city of Charlotte through its Park and Recreation Commission for white people's parks and playgrounds, parkways and municipal golf courses only."

2. Provisions that the lands shall be beautified and maintained so as to keep them suitable for parks, etc., at a cost of not less than $5,000.00 annually for the first 8 years.

3. Provisions for construction of driveways.

4. Adjacent lands now owned by city of Charlotte shall be set aside by it as a part of this proposed park.

5. In the event the lands are not kept and maintained at an expenditure as aforesaid and are not used for parks and playgrounds only, the "said lands shall revert in fee simple to the undersigned donors"; each donor to have reverted back to him the land he gave.

Three. On 18 February 1929 plaintiff approved said offer. On 21 February 1929 the city of Charlotte accepted said offer, and agreed to the terms thereof by ordinance duly passed and adopted.

Four: On 22 May 1929 the defendant Barringer, and wife, by deed properly recorded, conveyed as a gift certain lands therein described to plaintiff for use as a park, playground and recreational system of the city of Charlotte to be known as Revolution Park. This deed in the granting clause conveys the land to the plaintiff here "upon the terms and conditions, and for the uses and purposes, as hereinafter fully set forth." The *habendum* clause is to have and to hold the land "upon the following terms and conditions, and for the following uses and purposes, and none other," which are set forth as follows: 1. The land conveyed by this deed, together with other lands conveyed to plaintiff by W. T. Shore, and wife, T. C. Wilson, and wife, Abbott Realty Co. and the city of Charlotte shall be maintained and operated by plaintiff as an integral part of a park, playground and recreational area, to be known as Revolution Park, "for use of, and to be used and enjoyed

by persons of the white race only." 2. Here follows the other conditions of the offer. Then the deed contains this language:

> "In the event that the said lands comprising the said Revolution Park area as aforesaid, being all of the lands hereinbefore referred to, shall not be kept and maintained as a park, playground and/or recreational area, at an average expenditure of five thousand dollars ($5,000) per year, for the eight-year period as aforesaid, and/or in the event that the said lands and all of them shall not be kept, used and maintained for park, playground and/or recreational purposes, for use by the white race only, and if such disuse or non-maintenance continue for any period as long as one year, and/or should the party of the second part, or its successors, fail to construct or have constructed the roadway above referred to, within the time specified above, then and in either one or more of said events, the lands hereby conveyed shall revert in fee simple to the said Osmond L. Barringer, his heirs or assigns; provided, however, that before said lands, in any such event, shall revert to the said Osmond L. Barringer and as a condition precedent to the reversion of the said lands in any such event, the said Osmond L. Barringer, his heirs or assigns, shall pay unto the party of the second part or its successors the sum of thirty-five hundred dollars ($3500)."

Five. On 22 May 1929 W. T. Shore, and wife, T. C. Wilson, and wife, by deed properly recorded, conveyed as a gift certain lands therein described to plaintiff upon the terms and conditions and for the same uses and purposes as set forth in the defendant Barringer's deed. The provisions in this deed as to the use of the land, and the lan-

guage as to reversion to the donors, are similar to the Barringer deed, except there is no provision that as a condition precedent to a reversion the grantors shall pay any money to the grantee. A number of years later a controversy arose between W. T. Shore and T. C. Wilson on the one side and the plaintiff here on the other over this land they conveyed as a gift. Action was instituted by W. T. Shore and T. C. Wilson against the plaintiff here, which action was compromised and settled by the plaintiff here, the defendant in that case, paying to W. T. Shore $3,600 for all rights of reversion, forfeiture, re-entry and interest which Shore had, has, or might have in the lands he conveyed by gift, and paying to the heirs of Wilson $2,400 for the same rights. As a part of the compromise and settlement, W. T. Shore and the heirs of Wilson, by separate deeds, remised, released and forever quit-claimed unto the plaintiff here all rights of reversion, forfeiture, entry, re-entry, title, interest, equity and estate, and all other rights of every nature, kind and character, which they had. now have, or might have hereafter in the said lands.

Six. On 22 May 1929 Abbott Realty Company, by deed properly recorded, conveyed as a gift certain lands therein described to plaintiff upon the terms and conditions and for the same uses and purposes, and for use of the white race only, as set forth in the defendant Barringer's deed. This deed contains a reverter provision, but it does not provide that if the lands conveyed are used by members of a non-white race that the lands conveyed as a gift shall revert back to the grantor. Nor does it contain a provision that as a condition precedent to reversion Abbott Realty Company shall pay to the grantee any money.

Seven. On 22 May 1929 the city of Charlotte conveyed to plaintiff certain adjacent lands owned by it to form a

part of Revolution Park. This park is composed of this land and the lands conveyed to Barringer, Shore, Wilson and Abbott Realty Company. The city's deed provides that should the lands conveyed by it and the lands conveyed by the other parties named above shall not at any time for 12 consecutive months be used for park, playground or recreational purposes for use by persons of the white race only, then the land conveyed by the city shall cease to be a park, playground, etc., and shall revert to the city of Charlotte.

Eight. Plaintiff has in Revolution Park a municipal swimming pool, municipal tennis courts and the Bonnie Brae Golf Course, which it operates and maintains as a part of the recreational system of Charlotte. Bonnie Brae Golf Course is situated on the lands given to plaintiff by Shore and Wilson, and conveyed to plaintiff by the city of Charlotte. This golf course is the only one operated and maintained by plaintiff, and it and the other recreational features of Revolution Park are operated by plaintiff for the exclusive use of members of the white race. All Negroes are denied the use of this golf course because of the restrictions in the above deeds.

Nine. In December 1951 all the defendants, except Barringer, Abbott Realty Company and the city of Charlotte presented to plaintiff a petition stating that they are Negroes, and because they are Negroes, they have been denied the right to use this golf course, in violation of their constitutional rights, and demanding that they be permitted to use this golf course.

Ten. Plaintiff by operation of law is charged with the duty of operating and maintaining recreational facilities for the citizens of Charlotte, and does not desire to deprive any of its citizens of their legal rights, nor does plaintiff

desire to lose by reverter any of the properties entrusted to it for recreational purposes, nor does it desire to fail to comply with the terms of any gifts made to it by any of its citizens. Therefore, by reason of the aforesaid petition the plaintiff immediately instituted suit against the grantors of the lands composing Revolution Park to obtain a judicial determination of the effect of allowing Negroes to use the golf course in said park, because of the reverter provisions and the restrictions as to use in their deeds. The appellants were made parties to the suit. Pending a final decision in such suit plaintiff refused petitioner's request.

Eleven. The defendant Barringer is ready, able and willing to pay the sum of $3,500 as a condition precedent to the reversion of the land to him as provided in his deed of gift to the plaintiff.

Upon these facts found the judge made following conclusions of law and entered judgment accordingly:

1. The court has jurisdiction of the property and the parties, and is empowered to enter judgment under the Declaratory Judgment Act. G. S. N. C. 1-253 *et seq.*

2. The deeds from Osmond L. Barringer, and wife, and from Abbott Realty Company vested in plaintiff a valid determinable fee with the possibility of reverter in and to the lands described in the deeds.

3. In the event any of the reverter provisions in the Barringer deed or the Abbott Realty Company deed be violated, then and in such event title to the lands conveyed in said deeds will by operation of law immediately revert title in the grantors: and the admission of Negroes on the Bonnie Brae Golf Course to play golf will cause the reverter provisions in said deeds immediately to become operative, and title to revert.

4. The deed from the city of Charlotte vested in plaintiff a valid determinable fee with the possibility of reverter. That the use of Bonnie Brae Golf Course by negroes as players would not cause a reversion of the property conveyed by the city of Charlotte to plaintiff, for that the reversionary clause in the city's deed is, under such circumstances, void as being in violation of the 14th Amendment to the U. S. Constitution.

5. The plaintiff is the owner in fee, free of any conditions, reservations or reverter provisions of the lands conveyed to it by Shore and Wilson.

6. Revolution Park was created as an integral area of land, and to permit negroes to play golf on any part of said land will cause the reverter provisions in the Barringer and Abbott Realty Company deeds immediately to become effective and result in the title of plaintiff terminating and the lands reverting to Barringer and Abbott Realty Company.

From the judgment entered the defendants, except Osmond L. Barringer, Abbott Realty Company and the city of Charlotte, appealed, assigning error.

T. H. Wyche and Spottswood W. Robinson, III, for Charles W. Leeper, I. P. Farrar, Sadler S. Gladden, Robert H. Greene, James Heath, Henry M. Isley, Russell McLaughlin, Anthony M. Walker, Harold Walker, Edward J. Weddington, James J. Weddington, Willie Lee Weddington, L. A. Warner, G. M. Wilkins, Roy S. Wynn, and Rudolph M. Wyche, Defendants, Appellants.

Cochran, McCleneghan & Miller and F. A. McCleneghan and Lelia M. Alexander for Osmond L. Barringer, Defendant, Appellee.

John D. Shaw for Charlotte Park and Recreation Commission, Plaintiff, Appellee.

Appendix A

PARKER, J.

The decision of the Trial Judge that he had jurisdiction of the property and the parties, and was empowered to enter judgment under the Declaratory Judgment Act is correct. G. S. 1-253 *et seq.*, Lide v. Mears, 231 N. C. 111, 56 S. E. 2d 404.

There are no exceptions to the Judge's findings of fact.

We shall discuss first the Barringer Deed, which by reference, as well as all the other deeds mentioned in the statement of facts, is incorporated in the findings of fact, and made a part thereof. The first question presented is: Does the Barringer Deed create a fee determinable on special limitations, as decided by the Trial Judge?

This Court said in Hall v. Turner, 110 N. C. 292, 14 S. E. 791: "Whenever a fee is so qualified as to be made to determine, or liable to be defeated, upon the happening of some contingent event or act, the fee is said to be base, qualified or determinable."

"An estate in fee simple determinable, sometimes referred to as a base or a qualified fee, is created by any limitation which, in an otherwise effective conveyance of land, creates an estate in fee simple and provides that the estate shall automatically expire upon the occurrence of a stated event. . . . No set formula is necessary for the creation of the limitation, any words expressive of the grantor's intent that the estate shall terminate on the occurrence of the event being sufficient. . . . So, when land is granted for certain purposes, as for a schoolhouse, a church, a public building, or the like, and it is evidently the grantor's intention that it shall be used for such purposes only, and that, on the cessation of such use, the estate shall end, without any re-entry by the grantor, an estate of the kind now under consideration is created. It is necessary, it has been said, that the event named as terminating the estate be such that it may by possibility never happen at all, since it is an

essential characteristic of a fee that it may possibly endure forever." Tiffany: Law of Real Property, 3rd Ed., Sec. 220.

In Connecticut Junior Republic Association v. Litchfield, 119 Conn. 106, 174 A. 304, 95 A. L. R. 56, the real estate was devised by Mary T. Buell to the George Junior Republic Association of New York with a precatory provision that it be used as a home for children. The New York association by deed conveyed this land to plaintiff, "its successors and assigns, in trust, as long as it may obey the purposes expressed in . . . the will . . . and as long as the (grantee) shall continue its existence for the uses and purposes as outlined in the preamble of the constitution of the National Association of Junior Republics, but if at any time it shall fail to so use said property for said purposes . . . then the property hereby conveyed shall revert to this grantor, or its successors." The Supreme Court of Connecticut said: "The effect of the deed was to vest in the plaintiff a determinable fee. Here, as in First Universalist Society v. Boland, 155 Mass. 171, 174, 29 N. E. 524, 15 L. R. A. 231, the terms of the deed 'do not grant an absolute fee, nor an estate or condition, but an estate which is to continue till the happening of a certain event, and then to cease. That event may happen at any time, or it may never happen. Because the estate may last forever, it is a fee. Because it may end on the happening of the event it is what is usually called a determinable or qualified fee.' See, also, City National Bank v. Bridgeport, 109 Conn. 529, 540, 147 A. 181; Battistone v. Banulski, 110 Conn. 267, 147 A. 820."

In First Universalist Society v. Boland, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231, "the grant of the plaintiff was to have and to hold, etc., 'so long as said real estate shall by said society or its assigns be devoted to the uses, interests and support of those doctrines of the Christian re-

ligion' as specified; 'and when said real estate shall by said society or its assigns be diverted from the uses, interests, and support aforesaid to any other interests, uses, or purposes than as aforesaid, then the title of said society or its assigns in the same shall forever cease, and be forever vested in the following named persons, etc.'" The Supreme Court of Connecticut in Connecticut Junior Republic Association v. Litchfield, supra, has quoted the language of this case holding that the grant creates "a determinable or qualified fee." Immediately after the quoted words, the Massachusetts Court used this language: "The grant was not upon a condition subsequent, and no re-entry would be necessary; but by the terms of the grant the estate was to continue so long as the real estate should be devoted to the specified uses, and when it should no longer be so devoted then the estate would cease and determine by its own limitation."

In Brown v. Independent Baptist Church of Woburn, 325 Mass. 645, 91 N. E. 2d 922, the will of Sarah Converse devised land "to the Independent Baptist Church of Woburn, to be holden and enjoyed by them so long as they shall maintain and promulgate their present religious belief and faith and shall continue a church; and if the said church shall be dissolved, or if its religious sentiments shall be changed or abandoned, then my will is that this real estate shall go to my legatees hereinafter named." The Court said: "The parties apparently are in agreement, and the single justice ruled, that the estate of the church in the land was a determinable fee. We concur. (Citing authorities.) The estate was a fee, since it might last forever, but it was not an absolute fee, since it might (and did) 'automatically expire upon the occurrence of a stated event.'"

In Smith v. School Dist. No. 6 of Jefferson County (Missouri), 250 S. W. 2d 795, the deed contained this pro-

vision: "The said land being hereby conveyed to said school district for the sole and express use and purpose of and for a schoolhouse site and it is hereby expressly understood that whenever said land shall cease to be used and occupied as a site for a schoolhouse and for public school purposes that then this conveyance shall be deemed and considered as forfeited and the said land shall revert to said party of the first part, his heirs and assigns." The Court held that the estate conveyed was a fee simple determinable.

In Collette v. Town of Charlotte, 114 Vt. 357, 45 A. 2d 203, the deed provided that the land "was to be used by said town for school purposes, but when said town fails to use it for said school purposes it shall revert to said Schofield" (the grantor), "his heirs and assigns, but the town shall have the right to remove all buildings located thereon. The town shall not have the right to use the premises for other than school purposes." The Supreme Court of Vermont in a well reasoned opinion supported by ample citation of authority said: "It was held in Fall Creek School Twp. v. Shuman, 55 Ind. App. 232, 236, 103 N. E. 677, 678, that a conveyance of land 'to be used for school purposes' without further qualification, created a condition subsequent. The same words were used in Scofield's deed to the Town of Charlotte, but they were followed by the provision that 'when said Town fails to use it for said school purposes it shall revert to said Scofield, his heirs or assigns,' clearly indicating the intent of the parties to create a determinable fee, which was, we think, the effect of the deed. North v. Graham, 235 Ill. 178, 85 N. E. 267, 18 L. R. A., N. S., 624, 626, 126 Am. St. Rep. 189."

In Mountain City Missionary Baptist Church v. Wagner, 193 Tenn. 625, 249 S. W. 2d 875, the deed is an ordinary deed conveying certain real estate. After the *habendum* clause there appears the following language: "But

it is distinctly understood that if said property shall cease to be used by the said Missionary Baptist Church (for any reasonable period of time) as a place of worship, that said property shall revert back to the said M. M. Wagner and his heirs free from any encumbrances whatsoever and this conveyance become null and void." The grantor was M. M. Wagner. The Court said: "When we thus read the deed, as a whole, we find that the unmistakable and clear intention of the grantor was to give this property to the church so long as it was used for church purposes and then when not so used the property was to revert to the grantor or his heirs. The estate thus created in this deed is a determinable fee."

In Magness v. Kerr, 121 Ore. 373, 254 Pac. 1012, 51 A. L. R. 1466, the deed contained the following provision, to-wit: "Provided and this deed is made upon this condition, that should said premises at any time cease to be used for cooperative purposes, they shall, upon the refunding of the purchase price and reasonable and equitable arrangement as to the disposition of the improvements, revert to said grantors." The Court held that this was a grant upon express limitation, and the estate will cease upon breach of the condition without any act of the grantor.

For other cases of a determinable fee created under substantially similar language see: Doffelt v. Decatur School District No. 17, 212 Ark. 743, 208 S. W. 2d 1; Regular Predestinarian Baptist Church of Pleasant Grove v. Parker, 373 Ill. 607, 27 N. E. 2d 522, 137 A. L. R. 635; Board of Education for Jefferson County v. Littrell, 173 Ky. 78, 190 S. W. 465; Pennsylvania Horticultural Society v. Craig, 240 Pa. 137, 87 A. 678.

We have held in Ange v. Ange, 235 N. C. 506, 71 S. E. 2d 19, that the words "for church purposes only" appearing at the conclusion of the *habendum* clause, where there

is no language in the deed providing for a reversion or forfeiture in event the land ceases to be used as church property, does not limit the estate granted. To the same effect: Shaw University v. Ins. Co., 230 N. C. 526, 53 S. E. 2d 656.

In Abel v. Girard Trust Co., 365 Pa. 34, 73 A. 2d 682, there was in the *habendum* clause of the deed a provision for exclusive use as a public park for the use and benefit of the inhabitants of the Borough of Bangor. The Supreme Court of Pennsylvania said: "An examination of the deed discloses that there is no express provision for a reversion or forfeiture. The mere expression of purpose will not debase a fee." To the same effect see: Miller v. Village of Brookville, 152 Ohio St. 217, 89 N. E. 2d 85, 15 A. L. R. 2d 967; Ashuelot Nat. Bank v. Keene, 74 N. H. 148, 65 A. 826, 9 L. R. A. (NS) 758.

In North Carolina we recognize the validity of a base, qualified or determinable fee. Hall v. Turner, *supra*; Williams v. Blizzard, 176 N. C. 146, 96 S. E. 957; Turpin v. Jarrett, 226 N. C. 135, 37 S. E. 2d 124. See also: 19 N. C. L. R. pp. 334-344: in this article a helpful form is suggested to create a fee determinable upon special limitation.

When limitations are relied on to debase a fee they must be created by deed, will, or by some instrument in writing in express terms. Abel v. Girard Trust Co., *supra*; 19 Am. Jur., Estates, Section 32.

In the Barringer Deed in the granting clause the land is conveyed to plaintiff "upon the terms and conditions, and for the uses and purposes, as hereinafter fully set forth." The *habendum* clause reads, "to have and to hold the aforesaid tract or parcel of land . . . upon the following terms and conditions, and for the following uses and purposes, and none other, to-wit. . . . The lands hereby conveyed, together with the other tracts of land above referred to (the Shore, Wilson and City of Charlotte lands) "as

forming Revolution Park, shall be held, used and maintained by the party of the second part" (the plaintiff here, " . . . as an integral part of a park, playground and recreational area, to be known as Revolution Park and to be composed of the land hereby conveyed and of the other tracts of land referred to above, said park and/or recreational area to be kept and maintained for the use of, and to be used and enjoyed by persons of the white race only." The other terms and conditions as to the use and maintenance, etc., of the land conveyed are omitted as not material. The pertinent part of the reverter provision of the deed reads: "In the event that the said lands comprising the said Revolution Park area as aforesaid, being all of the lands hereinbefore referred to . . . and/or in the event that the said lands and all of them shall not be kept, used and maintained for park, playground and/or recreational purposes, for use by the white race only . . . then, and in either one or more of said events, the lands hereby conveyed shall revert in fee simple to the said Osmond L. Barringer, his heirs and assigns," provided, however, that before said lands shall revert to Barringer, and as a condition precedent to the reversion, Barringer, his heirs or assigns, shall pay unto plaintiff or its successors $3,500.00.

Barringer by clear and express words in his deed limited in the granting clause and in the *habendum* clause the estate granted, and in express language provided for a reverter of the estate granted by him, to him or his heirs, in the event of a breach of the expressed limitations. It seems plain that his intention, as expressed in his deed, was that plaintiff should have the land as long as it was not used in breach of the limitations of the grant, and, if such limitations, or any of them, were broken, the estate should automatically revert to the grantor by virtue of

the limitations of the deed. In our opinion, Barringer conveyed to plaintiff a fee determinable upon special limitations.

It is a distinct characteristic of a fee determinable upon limitation that the estate automatically reverts at once on the occurrence of the event by which it is limited, by virtue of the limitation in the written instrument creating such fee, and the entire fee automatically ceases and determines by its own limitations. Collette v. Town of Charlotte, *supra*; First Universalist Society v. Boland, *supra*; Brown v. Independent Baptist Church of Woburn, *supra*; Copenhaver v. Pendleton, 155 Va. 463, 155 S. E. 802, 77 A. L. R. 324; Tiffany: Law of Real Property, 3rd Ed., Section 217. No action on the part of the creator of the estate is required, in such event, to terminate the estate. 19 Am. Jur., Estates, Section 29.

According to the deed of gift "Osmond L. Barringer, his heirs and assigns" have a possibility of reverter in the determinable fee he conveyed to plaintiff. It has been held that such possibility of reverter is not void for remoteness, and does not violate the rule against perpetuities. 19 Am. Jur., Estates, Section 31; Tiffany: Law of Real Property, 3rd Ed., Section 314.

The land was Barringer's, and no rights of creditors being involved, and the gift not being induced by fraud or undue influence, he had the right to give it away if he chose, and to convey to plaintiff by deed a fee determinable upon valid limitations, and by such limitations provide that his bounty shall be enjoyed only by those whom he intended to enjoy it. 24 Am. Jur., Gifts, p. 731; Devlin: The Law of Real Property and Deeds, 3rd Ed., Section 838; 38 C. J. S., Gifts, p. 816. In Grossman v. Greenstein, 161 Md. 71, 155 A. 190, the Court said: "A donor may limit a gift to a particular purpose, and render it so conditioned and dependent upon an expected state of facts that, failing that

state of facts, the gift should fail with it." The 15th headnote in Brahmey v. Rollins, (N. H.) 179 A. 186, reads: "Right to alienate is an inherent element of ownership of property which donor may withhold in gift of property." We know of no law that prohibits a white man from conveying a fee determinable upon the limitation that it shall not be used by members of any race except his own, nor of any law that prohibits a negro from conveying a fee determinable upon the limitation that it shall not be used by members of any race, except his own.

If negroes use the Bonnie Brae Golf Course, the determinable fee conveyed to plaintiff by Barringer, and his wife, automatically will cease and terminate by its own limitation expressed in the deed, and the estate granted automatically will revert to Barringer, by virtue of the limitation in the deed, provided he complies with the condition precedent by paying to plaintiff $3,500.00, as provided in the deed. The operation of this reversion provision is not by any judicial enforcement by the State Courts of North Carolina, and Shelley v. Kraemer, 334 U. S. 1, 92 L. Ed. 1161, has no application. We do not see how any rights of appellants under the 14th Amendment to the U. S. Constitution, Section 1, or any rights secured to them by Title 42 U. S. Code, Sections 1981 and 1983, are violated.

If negroes use Bonnie Brae Golf Course, to hold that the fee does not revert back to Barringer by virtue of the limitation in the deed would be to deprive him of his property without adequate compensation and due process in violation of the rights guaranteed to him by the 5th Amendment to the U. S. Constitution and by Art. 1, Sec. 17 of the N. C. Constitution, and to rewrite his deed by judicial fiat.

The appellants' assignment of error No. 1 to the conclusion of law of the court that the Barringer deed vested a valid determinable fee in plaintiff with the pos-

sibility of a reverter, and assignments of error No. 3 and No. 4 to the conclusion of the court that in the event any of the limitations in the Barringer deed are violated, title to the land will immediately revert to Barringer and that the use of Bonnie Brae Golf Course by negroes will cause a reverter of the Barringer deed, are overruled.

The case of Bernard v. Bowen, 214 N. C. 121, 198 S. E. 584, is distinguishable. For instance, there is no limitation of the estate conveyed in the granting clause.

Now as to the Abbott Realty Company deed. This deed conveyed as a gift certain lands to plaintiff upon the same terms and conditions, and for the same uses and purposes, and for the white race only, as set forth in the Barringer deed. This deed contains a reverter provision, if there is a violation of certain limitations of the estate conveyed, but the reverter provision does not provide that, if the lands of Revolution Park are used by members of a non-white race, the lands conveyed by Abbott Realty Company to plaintiff shall revert to the grantor. In our opinion, the estate conveyed by Abbott Realty Company to plaintiff is a fee determinable upon certain expressed limitations set forth in the deed, with a possibility of reverter to Abbott Realty Company if the limitations expressed in the deed are violated and the reverter provision states that such violations will cause a reverter. That was the conclusion of law of the Trial Judge, and the appellants' assignment of error No. 2 thereto is overruled. However, the reverter provision does not require a reverter to Abbott Realty Company, if the lands of Revolution Park are used by negroes. Therefore, if negroes use Bonnie Brae Golf Course, title to the lands conveyed by Abbott Realty Company to plaintiff will not revert to the grantor. See: Tucker v. Smith, 199 N. C. 502, 154 S. E. 826.

The Trial Judge concluded as a matter of law that if any of the reverter provisions in the Abbott Realty Com-

pany deed were violated, title would revert to Abbott Realty Company, and that if negroes use Bonnie Brae Golf Course, title to the land granted by Abbott Realty Company will revert to it. The appellants' assignments of error Nos. 5 and 6 are to this conclusion of law. These assignments of error are sustained to this part of the conclusion, that if negroes use Bonnie Brae Golf Course, title to the land will revert to Abbott Realty Company: and as to the other part of the conclusion the assignments of error are overruled.

The appellants' assignment of error No. 7 is to this conclusion of law of the Trial Judge, that the deed from the city of Charlotte to plaintiff created a valid determinable fee with the possibility of a reverter, and that as the city of Charlotte has only one municipal golf course, the use of Bonnie Brae Golf Course by negroes will not cause a reversion of title to the property conveyed by the city of Charlotte to plaintiff, for that said reversionary clause in said deed is, under such circumstances void as being in violation of the 14th Amendment to the U. S. Constitution.

From this conclusion of law the city of Charlotte and the plaintiff did not appeal. We do not see in what way appellants have been aggrieved by this conclusion of law, and their assignment of error thereto is overruled.

The appellants also include as part of their assignments of error Nos. 3, 4, 5 and 6 these conclusions of law of the Trial Judge numbered 7 and 8. No. 7, that the plaintiff is the owner in fee simple, free of any conditions, reservations or reverter provisions of the property which was conveyed to it by W. T. Shore and T. C. Wilson. The city of Charlotte has not appealed from this conclusion of law, and we are unable to see how appellants have been harmed, so their assignments of error thereto are overruled. No. 8, that Revolution Park, in which is located Bonnie Brae

Golf Course, was created as an integral area of land, comprising the various contiguous tracts conveyed to plaintiff by Barringer, Abbott Realty Company, city of Charlotte, Shore and Wilson, and to permit negroes to use for golf any part of said land will cause the reverter provisions in the Barringer and Abbott Realty Company deeds immediately to become effective, and result in title of the plaintiff terminating, and the property reverting to Barringer and Abbott Realty Company. As to this conclusion of law the assignments of error are sustained as to that part which states that, if negroes use Bonnie Brae Golf Course, the reverter provision in the Abbott Realty Company deed will become effective and title will revert to Abbott Realty Company: as to the other parts the assignments of error are overruled.

Judgment will be entered below in accordance with this opinion.

Modified and affirmed.

Judgment of the Supreme Court of North Carolina entered June 30, 1955

This cause came on to be argued upon the transcript of the record from the Superior Court, Mecklenburg County. Upon consideration whereof,

It is adjudged by the Court here that the opinion of the Court, as delivered by the Honorable R. Hunt Parker, Justice, be certified to the said Superior Court, to the intent that the judgment be and the same is hereby modified and affirmed as indicated in said opinion.

And it is considered and adjudged further, that the defendant, except Osmond L. Barringer and City of Charlotte, and sureties to the appeal bond, Dr. J. D. Martin and A. E. Spears do pay the cost of the appeal in this Court incurred, to wit, the sum of sixty-seven and 90 .....dollars ($67.90), and execution issue therefor.

APPENDIX B

Petition for Rehearing Denied

On the back of Petition to Rehear is written the following:

"Petition to Rehear Denied
This 1 November 1955.

R. Hunt Parker
Carlisle W. Higgins
Associate Justices Supreme Court
of North Carolina."

The above was filed in the Office of the Clerk of the Supreme Court on November 1, 1955.

APPENDIX C

An Ordinance to Set Aside and Dedicate Certain Lands of the City of Charlotte for Park and Recreation Purposes.

WHEREAS, By the terms of an offer dated August 31, 1927, Abbott Realty Company, Osmond L. Barringer, W. T. Shore, T. C. Wilson, Maie L. Toomey and husband, T. C. Toomey, have offered and agreed in writing to convey to the Charlotte Park and Recreation Commission, of the City of Charlotte, N. C., and its successors, certain lands lying in and near the southwestern section of the City of Charlotte and along Irwin Creek, containing 90 acres, more or less, as described in said written offer, a copy of which is hereto attached marked "Exhibit A" and made a part hereof, said lands being offered for use by the City of Charlotte, through its Park and Recreation Commission, for parks, play-grounds, park-ways and municipal golf courses for use by persons of the white race only and upon the conditions as fully set forth in said writing hereto attached marked "Exhibit A", and upon the further condition that the whole and every part of the tract of land now owned by the City of Charlotte, lying to the south of and adjoining the said lands so offered as aforesaid, be set aside and dedicated by the City of Charlotte as part and parcel of the said park and play-ground to be used under the supervision of the Charlotte Park and Recreation Commission for a park, play-ground, municipal golf courses and other recreational activities;

AND WHEREAS, The said offer has been approved by the Charlotte Park and Recreation Commission and said Commission has recommended its immediate acceptance by the City of Charlotte:

Appendix C

NOW, THEREFORE, THE BOARD OF COMMISSIONERS OF THE CITY OF CHARLOTTE DO ORDAIN:

1. That the tract of land belonging to the City of Charlotte, lying along Irwin's Creek, adjoining the lands of Toomey, Shore and Wilson et al., be, and the same hereby is, set aside, dedicated and designated as a park and recreation area for use by people of the white race only as a park, play-ground, municipal golf courses and any other recreational activities under the general supervision and control of the Charlotte Park and Recreation Commission, and its successors in office, the said land being more particularly described by metes and bounds as follows:

> Situate, lying and being in Charlotte Township, Mecklenburg County, State of North Carolina—BEGINNING at the point of intersection of the center line of Irwin Creek and the southerly margin of West Tremont Avenue, and running thence with the said margin of Tremont Avenue three lines as follows: (1) S. 60 deg. 48′ E. 139.4 feet; (2) S. 38 deg. 44′ E. 59.9 feet; (3) S. 22 deg. 42′ E. 259.2 feet to a stake in Toomey's line; thence with three of Toomey's lines: (1) S. 43 deg. 14′ W. 643 feet to a stake; (2) S. 30 deg. 31′ E. 830 feet to a stake; (3) S. 46 deg. 55′ E. 373.5 feet to a stone; thence S. 50 deg. 15′ W. 151 feet to a stake; thence S. 41 deg. 25′ W. 680 feet to a stake; thence S. 31 deg. 17′ W. 523 feet to a stake; thence S. 41 deg. 30′ W. 1386 feet to a stake; thence N. 1 deg. 15′ E. 130 ft. to a stake; thence N. 6 deg. 14′ W. 814 ft. to a stake; thence N. 25 deg. 30′ W. 1160 ft. to the center of Irwin Creek; thence up and with the center or Irwin Creek to the point or place of BEGINNING.

Said land being so designated, set aside and dedicated for the uses set forth above upon the following terms and conditions, to wit:

1. Said land shall be used as an integral part of a park area to be composed of the land above described and of the lands which the several land owners referred to above have agreed to convey for park purposes; and, in the event that the lands so agreed to be conveyed by the above named land owners for park purposes shall not at any time for the period of twelve consecutive months be used, kept and maintained for park, play-ground and recreational purposes, then the lands so dedicated and set aside by the City of Charlotte as aforesaid shall cease to be park, play-ground or recreation land and shall revert to the City of Charlotte.

2. The City of Charlotte reserves and shall have the right to keep, maintain, extend, repair, replace and/or enlarge and tap on to the present sewer line or outfall now located across the lands dedicated by the City of Charlotte as aforesaid, together with the right to enter upon the said land at any and all reasonable times for the purpose of enjoying and exercising the rights so reserved.

3. The City of Charlotte shall have and hereby reserves the right to continue to use as a dumping ground that part of the said lands so dedicated which is now being used for such purpose until completion of the incinerator plant by the City of Charlotte, such use, however, not to extend for longer than August 1, 1929.

4. That the offer of the parties above named, copy of which is hereto attached marked "Exhibit A" be, and the same hereby is, approved and accepted; provided, however, that the City of Charlotte does not hereby obligate itself and shall not be taken, held or construed as obligating itself

to carry out any of the terms and conditions of said offer other than the dedication by it of the land referred to above upon the terms hereinbefore set forth.

Approved as to form, Feb. 21, 1929:

/s/ JNO. A. MCRAE
City Attorney

Exhibit "A"

COPY

Charlotte, N. C.
August 31st, 1927.

TO THE PARK AND RECREATION COMMISSION
OF THE CITY OF CHARLOTTE:

We are pleased to offer to the City of Charlotte through you, for Park and Play Ground purposes, our lands described as follows, free from encumbrance:

> Beginning at the point of intersection of a vertical line drawn through the center of the arch of the Southern Railway culvert on the southeastern side of the culvert where it intersects the thread of the stream of Irwin Creek, running south and extending 100 yards, more or less, on both sides of the thread of said stream, and with that width, of 100 yards more or less, following the thread of the stream in its meanderings, southerly to the lands of the City

of Charlotte. Subject, however, to such variations in the width of the land on either or both sides of said stream as are necessitated by the contour of said land and streets as shown on Wilmoore map, and according to the sketch made thereof by the City of Charlotte Engineer at the direction of Dr. Parker of the National Park and Play Ground Association, which sketch is hereto attached and marked "Exhibit A", except the said lands on O. L. Barringer's side of the said stream shall take only part of the hill between Bissel Mill and Wilmont Bridges; also the whole of Lots 9 to 16, Block 46, of Wilmoore if said lots are improved for children's playground.

We offer these lands to the City of Charlotte upon the following conditions:

(1) Said lands are to be used by the City of Charlotte through its Park and Recreation Commission for white people's parks and play grounds, parkways and municipal golf courses only.

(2) Said lands shall be taken over by the said Park and Recreation Commission of the City of Charlotte within 24 months from the date of this offer and shall be beautified, maintained, kept up and improved by the City of Charlotte acting through its Park and Playground Commission at a cost and expenditure of an average of not less than $5000.00 per year for the period of 8 years, beginning from the time when the said lands are taken over by the said Commission, and after said period, said lands shall be maintained as such parks and play grounds, so as to keep them in suitable condition for aforesaid purposes.

(3) Said park lands within two years shall have constructed along either one side or the other of said stream a 20′ top soil driveway, according to specifications of Meck. Co. Highway Com., from Wilmount Bridge to the old water or grist mill, which was used by Cornwallis in the Battle of Charlotte during the Revolutionary War, and said driveway shall lead into the seventy-three and nine-tenths (73.9) to 100 acre tract of land adjoining and lying south of the Bissel Road and which tract is now owned by the City of Charlotte.

(4) Said land now owned by the City of Charlotte shall likewise be set aside by the said City as part and parcel of this Park and Play Ground, under the supervision of the said Parks and Play Grounds Commission of the City of Charlotte for a Park, Play Ground and Municipal Golf Course as aforesaid.

(5) In the event all of our said lands and that of the City are not kept and maintained at an expenditure of at least an average of $5000.00 annually for 8 yrs. as aforesaid by the said City of Charlotte, acting through the said Parks and Recreation Commission, and in the event said lands are not used and maintained for Parks and Play Ground purposes *only* as aforesaid, or are allowed to fall into disuse for as long as one year, then, in either event, our said land shall revert in fee simple to the undersigned donors, each donor to have so reverted back to him, or it, such identical land hereby offered by him, or it, as is accepted by the said City of Charlotte.

Appendix C

IN WITNESS WHEREOF, we the aforesaid undersigned land owners have hereunto set our hands and affixed our seals, this the 31st day of August, 1927.

ABBOTT REALTY COMPANY
By F. C. ABBOTT, Pres.

OSMOND L. BARRINGER (SEAL)
W. T. SHORE (SEAL)
T. C. WILSON (SEAL)
MAIE L. TOOMEY (SEAL)
T. C. TOOMEY (SEAL)

ATTEST:

T. M. ABBOTT
Secretary

NORTH CAROLINA
MECKLENBURG COUNTY
CITY OF CHARLOTTE

We approve the above offer and recommend its immediate acceptance by the City of Charlotte.

This the 18th day of Feb. 1929.

JOHN HILL TUCKER
MRS. J. A. YARBROUGH
J. L. WILKINSON
CAROL D. TALIAFERRO
MRS. W. T. SHORE
Charlotte Park & Recreation Commission
of the City of Charlotte

Appendix C

NORTH CAROLINA
MECKLENBURG COUNTY

We, the undersigned Mayor and Commissioners, constituting the Board of Commissioners of the City of Charlotte, upon the approval of the Park & Play Ground Commission of said City and recommendation thereof, hereby accept the above offer of the land owners aforesaid, and agree to the terms thereof, and according to said terms we hereby agree to set aside for the use of the said Park and Playground Commission, the lands of the City of Charlotte referred to in said offer.

APPENDIX D

An Ordinance Amending the Ordinance Entitled "An Ordinance to Set Aside and Dedicate Certain Lands of the City of Charlotte for Park and Recreation Purposes."

WHEREAS, On the 21st day of February, A. D., 1929, the Board of Commissioners of the City of Charlotte duly adopted an ordinance entitled "An Ordinance to set aside and dedicate certain lands of the City of Charlotte for Park and Recreation purposes"; and whereas, by the terms of the said ordinance, the dedication of the lands therein described was conditioned upon the gift to Charlotte Park and Recreation Commission of certain lands by Maie L. Toomey and husband, T. C. Toomey, and others; and whereas the said Charlotte Park and Recreation Commission has decided that it does not need the small area of land heretofore proposed to be given by Maie L. Toomey and husband, as set forth in said ordinance, in the development of the said park area and does not desire to take same; and whereas the other donors of land constituting the park and recreation area referred to in the said ordinance have agreed to the elimination of the said Toomey lands from the park area:

NOW, THEREFORE, The Board of Commissioners of the City of Charlotte do ordain:

1. That the small area of land heretofore proposed to be given by Maie L. Toomey and husband, T. C. Toomey, to form part of the Park and Recreation area referred to in the ordinance mentioned above may be eliminated from the said park or recreation area.

2. That the said ordinance entitled "An Ordinance to Set Aside and Dedicate Certain Lands of the City of Char-

lotte for Park and Recreation Purposes," adopted by the Board of Commissioners of the City of Charlotte on the 21st day of February, 1929, be, and the same hereby is changed and amended by striking out therefrom all references to Maie L. Toomey and husband, T. C. Toomey, and by striking out therefrom all references to any land given or offered to be given by the said Maie L. Toomey and husband, T. C. Toomey, as a part of the said park and recreation area.

3. That the ordinance referred to above and heretofore adopted by the Board of Commissioners of the City of Charlotte on February 21, 1929, as changed amended by the foregoing sections, be, and the same hereby is in all respects fully ratified and confirmed.

The foregoing ordinance was put on three readings and duly passed and adopted on each and declared to be an ordinance.

FILED
FEB 16
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 648

CHARLES W. LESLIE, I. P. FARRAR, SAMUEL S. GRAYDON, ROBERT H. GARRETT, JAMES HEATH, HERBERT M. HEATH, RUSSELL McLAUCHLIN, ARTHUR M. WALKER, HAROLD WALKER, EDWARD J. WHEELWRIGHT, JAMES J. WHEELWRIGHT, WILLIS LEE WHEELWRIGHT, L. A. WALKER, G. [illegible] WITT AND EUGENIA M. WITT, Petitioners,

v.

CHARLOTTE PARK AND RECREATION COMMISSION, A MUNICIPAL CORPORATION, GERALD L. BARRINGER, ARGYLE REALTY CORPORATION, A CORPORATION, AND CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, Respondents.

BRIEF OF RESPONDENT GERALD L. BARRINGER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK THOMAS MILLER, JR.,
Counsel for Respondent,
GERALD L. BARRINGER,
Address: Law Building
Charlotte, N. C.

F. A. McCLINTOCK,
LELIA M. ALEXANDER,
Address: Law Building,
Charlotte, N. C.
Of Counsel.

TABLE OF CONTENTS

	Page
Question Presented	1
Points and Authorities	2
I. Petitioners were not necessary parties to this proceeding	2
II. Property law only is involved in this case	3
III. Petitioners are not aggrieved by the North Carolina Supreme Court decision	4
IV. There is no state action involved in this proceeding	6
V. Petitioners have not exhausted other legal remedies which they have in the State of North Carolina	8
Conclusion	9

Table of Cases

Alabama State Federation of Labor v. *McAdory*, 325 U. S. 450 (1945)	10
American Ry. Express Co. v. *Commonwealth of Kentucky*, 273 U. S. 269 (1927)	3
Brittain v. *Taylor*, 168 N. C. 271, 84 S. E. 280 (1915)	7
Burgess v. *Seligman*, 107 U. S. 20 (1883)	4
Doremus v. *Board of Education*, 342 U. S. 429 (1952)	5
Hamilton Trust Co. v. *Cornucopia Mines Co.*, 223 Fed. 494 (9th Cir. 1915), cert. denied 239 U. S. 641 (1915)	5
Holmes v. *City of Atlanta*, — U. S. —, 100 L. Ed. (adv. p. 76)	8
Mayor and City Council of Baltimore City v. *Dawson*, — U.S. —, 100 L. Ed. (adv. p. 75)	8
Shelley v. *Kraemer*, 334 U. S. 1 (1947)	6
Tyler v. *U. S.*, 281 U. S. 497 (1930)	4
Warburton v. *White*, 176 U. S. 484 (1900)	4

Other Authorities

1A General Statutes of North Carolina, Sections 1-254, 1-260	3
2 Powell on Real Property, Sec. 178 and Sec. 187, n. 93 (1950)	6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 648

CHARLES W. LEEPER, I. P. FARRAR, SADLER S. GLADDEN, ROBERT H. GREENE, JAMES HEATH, HENRY M. ISLEY, RUSSELL McLAUGHLIN, ANTHONY M. WALKER, HAROLD WALKER, EDWARD J. WEDDINGTON, JAMES J. WEDDINGTON, WILLIE LEE WEDDINGTON, L. A. WARNER, G. M. WILKINS, ROY S. WYNN AND RUDOLPH M. WYCHE, *Petitioners,*

v.

CHARLOTTE PARK AND RECREATION COMMISSION, A MUNICIPAL CORPORATION, OSMOND L. BARRINGER, ABBOTT REALTY COMPANY, A CORPORATION, AND CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, *Respondents*

BRIEF OF RESPONDENT OSMOND L. BARRINGER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Question Presented

Does the interpretation of a deed by a state court constitute state action within the contemplation of the Fourteenth Amendment to the Constitution of the United States?

Argument

The respondent Barringer respectfully submits that this Court should deny the petition for writ of certiorari for that:

I

Petitioners were not necessary parties to this proceeding.

II

Property law only is involved in this case.

III

Petitioners are not aggrieved by the North Carolina Supreme Court decision.

IV

There is no state action involved in this proceeding.

V

Petitioners have not exhausted other legal remedies which they have in the State of North Carolina.

Points and Authorities

I

Petitioners were not necessary parties to this proceeding.

This action was instituted in the Superior Court of Mecklenburg County, North Carolina, by the Charlotte Park and Recreation Commission under the North Carolina Uniform Declaratory Judgment Act. Section 1-254 of that Act provides in part that "Any person interested under a deed . . . may have determined any question of construction or validity arising under the instrument . . . and obtain a declaration of rights, status or other legal relations thereunder. A contract may be construed either before or after there has been a breach thereof." Section 1-260 of the Act provides in part that "When declaratory judgment is sought, all persons shall be made parties who have or claim

any interest which would be affected by the declaration . . ." 1A, *General Statutes of North Carolina,* Sections 1-254, 1-260.

A reference to the Complaint which was filed in this case (Record 2) shows that Charlotte Park and Recreation Commission instituted the proceeding for the purpose of having the Court declare whether or not the reverter clauses in the deeds referred to therein were valid, whether or not the rights of reverter in said deeds were enforceable, and if Charlotte Park and Recreation Commission should permit persons other than white people to use the lands comprising Revolution Park, whether the same would revert to the grantors named in the deeds.

The only parties who were necessary and indispensable to the action were the plaintiff, Charlotte Park and Recreation Commission, grantee, and the defendants, O. L. Barringer and wife, Abbott Realty Company, and City of Charlotte, grantors in the deeds to be construed.

The petitioners herein were made parties defendant to this suit in order that their contentions might be presented to the court. (See Exhibit X, Record 82.)

None of the necessary parties to this proceeding has petitioned this Court for writ of certiorari. Only the petitioners who were not necessary parties to the action seek to have this Court review the North Carolina Supreme Court decision.

II

Property law only is involved in this case.

A careful examination of the facts in this case shows that property law only is involved. This Court has scrupulously adhered to the rule that the highest court of a state may administer the common law according to its own understanding and interpretation (see *American Ry. Express Co.* v. *Commonwealth of Kentucky,* 273 U. S. 269 (1927)) and

especially where the law which is being administered by the state tribunal is property law. See *Tyler* v. *U. S.*, 281 U. S. 497 (1930); *Warburton* v. *White*, 176 U. S. 484 (1900).

The North Carolina Supreme Court construed and interpreted the Barringer deed, and its holding that the estate created by the deed is a fee determinable upon special limitations is an authoritative declaration of what the law is with reference to its own property rules and should not under any circumstance be reviewed by this Court. See *Burgess* v. *Seligman*, 107 U. S. 20 (1883).

III

Petitioners are not aggrieved by the North Carolina Supreme Court decision.

The property conveyed by the Abbott deed to the Charlotte Park and Recreation Commission will not revert if Negroes use the Bonnie Brae Golf Course. (Petition for Writ, Appendix A, 35.)

The reverter provision in the deed from the City of Charlotte to the Charlotte Park and Recreation Commission is void. (Petition for Writ, Appendix A, 36.)

Certainly the petitioners are not aggrieved by these two facets of the North Carolina decision.

The reverter provision in the deed from Barringer and his wife to the Charlotte Park and Recreation Commission is valid and will become operative by its own limitation if Negroes use the Bonnie Brae Golf Course or any part of the land comprising Revolution Park for golf purposes. (Petition for Writ, Appendix A, 34.) There is only one golf course on the land comprising Revolution Park, and that is the Bonnie Brae Golf Course. (Record 93.) The Bonnie Brae Golf Course is not located on property which is included in the Barringer deed (Paragraph 14, Record 63), and title to the Bonnie Brae Golf Course property will

remain in Charlotte Park and Recreation Commission whether or not Negroes use the golf course.

It is true that the prayer in the Complaint filed in this proceeding contained a broader question than that answered by the Court—that is, whether or not the use by any persons other than white people of the lands comprising Revolution Park will cause the property conveyed by Barringer, Abbott Realty Company and the City of Charlotte to revert. However, the petitioners herein demanded only that they be given the right to play golf upon the municipal golf course (Paragraph 16, Record 5; Exhibit IX, Record 74), and the Supreme Court of North Carolina confined its holding to this very precise question, namely, whether the use by Negroes of Bonnie Brae Golf Course or any part of the land comprising Revolution Park for golf purposes will be the event which will cause the reverter to become effective. And since title to the Bonnie Brae Golf Course itself is not affected by this decision, it is difficult to see in what way the petitioners herein have been aggrieved.

This Court has said that a party is not aggrieved by the decision unless he can show some direct injury and that he is not aggrieved because he may suffer in some indefinite way in common with people generally. See *Doremus* v. *Board of Education,* 342 U. S. 429 (1952). If the property which Barringer gave to the Charlotte Park and Recreation Commission should revert to him, the petitioners as taxpayers may suffer with other taxpayers and citizens of the City of Charlotte. But they have not stated that their participation in this action is as taxpayers. The petitioners herein have no substantial appealable interest herein. They are merely nominal parties to this action, and nominal parties to an action cannot appeal. See *Hamilton Trust Co.* v. *Cornucopia Mines Co.,* 223 Fed. 494 (9th Cir. 1915), cert. denied 239 U. S. 641 (1915).

IV

There is no state action involved in this proceeding.

The North Carolina Supreme Court has neither executed nor enforced the provisions of the Barringer deed. The North Carolina Supreme Court has simply recognized the type estate which was created by the deed. Certainly there can be no execution or enforcement of the provisions of a deed by the mere recognition of the estate which it created, which type estate has been used in land law since the twelfth, thirteenth and fourteenth centuries and which type estate is recognized in North Carolina and in nearly thirty other states of the United States. See 2 *Powell on Real Property* Sec. 178 and Sec. 187, n. 93 (1950). Nor can the term "state action" as used by this Court in *Shelley* v. *Kraemer,* 334 U. S. 1 (1947), be so enlarged as to include the recognition of such an estate and its automatic termination by virtue of its own limitation and the reversion of the estate to the grantor. The deed in question was executed by Barringer and his wife and delivered by them in 1929, and the provisions were placed therein by Barringer, not by the State. Barringer has never contended that the reverter clause is invalid. He did not institute this action. The plaintiff Charlotte Park and Recreation Commission presented no contention that the reverter clause was invalid. The Charlotte Park and Recreation Commission only requested the Court to determine its validity and the event which would cause the fee to determine and the reverter to become operative. The Charlotte Park and Recreation Commission, plaintiff in the declaratory judgment action, and the defendants therein other than the petitioners herein have accepted the ruling of the Supreme Court of North Carolina.

In their Petition for Writ of Certiorari, petitioners state: "If the Commission should fail to obey the state court judgment by refusing to yield possession to Barringer on the occurrence of this event, ample judicial sanctions will be available to compel obedience, . . ." (Petition for Writ 10, 11.) The respondent Barringer respectfully submits that the petitioners are now asking this Court to consider a possibility which under the facts of this case will never come up. In the agreed statement of facts which was signed by counsel for Charlotte Park and Recreation Commission, by counsel for City of Charlotte, by counsel for Barringer, by counsel for Abbott Realty Company, and by counsel for defendants who are petitioners in this matter, Charlotte Park and Recreation Commission stated that it did not desire to fail to comply with the terms of any gifts made to it by any of its citizens or others. (Record 66.) Under the decisions of the North Carolina Court, if Negroes use the golf course, the estate which was conveyed to Charlotte Park and Recreation Commission by Barringer and his wife will cease and determine and the property will revert to Barringer. At that time and only at that time and then only if Charlotte Park and Recreation Commission should fail to yield possession would any action on the part of Barringer be necessary. And if action were necessary, that action could well be self-help on the part of Barringer in the form of exercising his right of entry by occupying the property (see *Brittain* v. *Taylor*, 168 N. C. 271, 84 S. E. 280 (1915)) rather than any form of state action. Since the Charlotte Park and Recreation Commission has already stated, however, that it does not desire to fail to comply with the terms of any gifts made to it by any of its citizens or others, it would seem that the possibility which has been brought to the attention of this Court by petitioners is far too remote for consideration.

V

Petitioners have not exhausted other legal remedies which they have in the State of North Carolina.

The respondent Barringer also respectfully calls to the attention of this Court the suit which is now pending in the Superior Court of Mecklenburg County, North Carolina, which was filed against Charlotte Park and Recreation Commission and others by petitioners herein subsequent to the institution of this declaratory judgment action, whereby petitioners herein in that action seek a declaratory judgment and an injunction restraining Charlotte Park and Recreation Commission, the City of Charlotte, and certain officials from refusing, because of his race and color, the admission of any of the petitioners herein, or any other Negro similarly situated, to the Bonnie Brae Golf Course. (Paragraph 20, Record 65; Petition for Writ 5.) It is obvious, therefore, that the petitioners herein have other legal remedies available to them in the State of North Carolina which they have not exhausted. In the case which the petitioners herein have instituted in the Superior Court of Mecklenburg County, North Carolina, and herein referred to, they may rely on this Court's recent decision in the case of *Mayor and City Council of Baltimore City* v. *Dawson*, U. S. , 100 L. Ed. (adv.p.75)(1955), in which decision this Court affirmed the decision of the United States Court of Appeals, Fourth Circuit, to the effect that racial segregation in recreational facilities can no longer be sustained as a proper exercise of the police power of the state, and they may also rely on this Court's action in the case of *Holmes* v. *City of Atlanta*, U. S. , 100 L. Ed. (adv. p.76) (1955), in vacating the judgments of both the United States Court of Appeals, Fifth Circuit, and the District Court. It would appear that the petitioners herein have

but to pursue the remedies open to them in the case which they have instituted in the Superior Court of Mecklenburg County, North Carolina, and which is now pending there in order to gain admission to the Bonnie Brae Golf Course.

This respondent respectfully submits that the petitioners herein have confused the two cases in which they are parties. This case in which they have petitioned this Court for a writ of certiorari involves an interpretation and construction of a deed and was determined by an authoritative declaration by the highest tribunal of North Carolina with reference to its own property rules. No state action is involved in the proceeding which they would have this Court review. The case which these petitioners have instituted in the Superior Court of Mecklenburg County, North Carolina, against Charlotte Park and Recreation Commission, the City of Charlotte, and others and which is now pending and in which the petitioners herein seek a declaratory judgment and an injunction restraining Charlotte Park and Recreation Commission, the City of Charlotte, and certain officials from refusing, because of his race and color, the admission of any of the petitioners herein or any other Negro similarly situated to the Bonnie Brae Golf Course, involves issues which the petitioners herein have sought to insert in this proceeding, and the authorities which petitioners have set out in their brief in this proceeding with reference to the Fourteenth Amendment to the Constitution of the United States are applicable not to this proceeding but to the action which is now pending in the Superior Court of Mecklenburg County, North Carolina, in which petitioners herein are plaintiffs, and which has not yet been tried.

Conclusion

This Court has said that the requirements for a justiciable case or controversy are no less strict in a declaratory judg-

ment proceeding than in any other type suit; that this Court is without power to give advisory opinions; that its considered practice is not to decide abstract, hypothetical or contingent questions or to decide any constitutional question in advance of the necessity for its decision or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied or to decide any constitutional question except with reference to the particular facts to which it is to be applied; and that the declaratory judgment procedure may be resorted to only in the sound discretion of the Court and where the interests of justice will be advanced and an adequate and effective judgment may be rendered. See *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450 (1945). Under these criteria this Court should not grant petitioners' petition for writ of certiorari.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court and that the petition for writ of certiorari should be denied.

Dated February 14, 1956.

Respectfully submitted,

FRANK THOMAS MILLER, JR.,
Counsel for Respondent,
Osmond L. Barringer.

F. A. MCCLENEGHAN,
LELIA M. ALEXANDER,
Of Counsel.

(7055-7)